



**Comptroller General  
of the United States**

Washington, D.C. 20548

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## **Decision**

**Matter of:** ProServe Corporation

**File:** B-243313

**Date:** July 22, 1991

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Pamela J. Mazza, Esq., Pilliero & Mazza, for the protester.  
Christopher Solop, Esq., Ott, Purdy & Scott, Ltd., for  
American Service Contractors, an interested party.  
Herbert F. Kelly, Jr., Esq., Department of the Army, for the  
agency.  
Scott H. Riback, Esq., and James A. Spangenberg, Esq., Office  
of the General Counsel, GAO, participated in the preparation  
of the decision.

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### **DIGEST**

1. Defense agency properly issued solicitation as a small business set-aside rather than setting aside requirement for small disadvantaged businesses where requirement was previously successfully acquired under small business set-aside; fact that agency did not exercise the fourth option in the prior contract does not show that requirement was not "successfully" acquired as a small business set-aside within meaning of Department of Defense Federal Acquisition Regulation Supplement.
2. Agency may restrict "limited competition" acquisition to small businesses.

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### **DECISION**

ProServe Corporation protests that request for proposals (RFP) No. DADA03-91-R-0005, issued by the Department of the Army to acquire nutrition services at the Fitzsimons Army Medical Center, should be issued as a small disadvantaged business (SDB) set-aside instead of as a small business set-aside.

We deny the protest.

The RFP was issued as a 100-percent small business set-aside. Prior to the issuance of the RFP, the agency, in 1987, had acquired the services using a small business set-aside, and had awarded a contract to a small business for a base period and four 1-year options. During performance of that contract the agency, due to certain procedural errors associated with

the exercise of the third option year,<sup>1/</sup> resolved not to exercise the fourth option year. Since there was not time to acquire these services under this protested RFP, the Army conducted an interim acquisition using other than full and open competitive procedures under 10 U.S.C. § 2304(c)(2) (1988), and awarded a short-term contract to ProServe in order to meet its continuing need for the services.

ProServe essentially argues that the agency erred in not setting aside this requirement for SDBs, since the previous long-term acquisition was not "successful" because the agency did not exercise the fourth option year<sup>2/</sup> and because the interim acquisition cannot be considered a small business set-aside. The agency responds that it has been acquiring these services through small business set-asides since 1982 and that, consequently, it was not obligated to consider using an SDB set-aside for this acquisition.

As a general rule, individual acquisitions must be considered for exclusive SDB participation where the contracting officer determines that there is a reasonable expectation that offers will be received from at least two SDB concerns and those offers will be within 10 percent of the fair market price for the requirement. Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 219.502-72(a) (DAC 88-13). Where a requirement has been previously acquired successfully under a small business set-aside, the agency may properly continue to acquire the goods or services in question using small business set-aside procedures, and need not consider

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<sup>1/</sup> The agency had failed to provide the incumbent contractor timely notice of its intent to exercise the third option year. In an effort to secure the contractor's performance during the third year notwithstanding its failure to provide timely notice, the Army agreed to renegotiate prices for the third option year and to renegotiate the fourth year option prices if that option were exercised. After attempting to exercise the fourth year option and being advised of the contractor's proposed increase to the fourth year prices, the agency elected not to continue performance under that contract and to obtain interim services pending award under the RFP protested here.

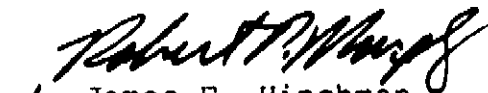
<sup>2/</sup> Regarding the agency's decision not to exercise the fourth option year, ProServe alleges that the Army's decision related to the fact that the contractor had incurred some \$55,000 worth of contract deficiencies.

conducting the acquisition as a SDB set-aside. DFARS § 219.502-72(b); Young-Robinson Assocs., Inc., B-242229, Mar. 22, 1991, 91-1 CPD ¶ 319, aff'd, B-242229.2, May 21, 1991, 91-1 CPD ¶ 494.

We conclude that the Army acted properly in issuing the subject RFP as a small business set-aside rather than as an SDB set-aside. The record confirms that the preceding long-term contract for this requirement was awarded in 1987 as a small business set-aside and that, contrary to the protester's assertions, the agency's decision to refrain from exercising the awardee's fourth option year did not relate in any way to the adequacy of that firm's performance. Rather, the record shows that the agency, in an exercise of its business judgment, declined to secure performance under the fourth option year of the predecessor contract because it would have been required to renegotiate the option prices. See footnote 1, supra.

As to the agency's interim acquisition of the services, the record shows that while the acquisition was conducted using other than full and open competition pursuant to 10 U.S.C. § 2304(c)(2), the procurement was designated a small business set-aside and the five firms that were solicited<sup>3/</sup> and responded were small businesses. Although the protester asserts that a limited competition under 10 U.S.C. § 2304(c)(2) cannot also be considered a small business set-aside, we are aware of no legal authority that would preclude an agency from restricting a "limited competition" acquisition to small businesses.<sup>4/</sup>

The protest is denied.

  
for James F. Hinchman  
General Counsel

<sup>3/</sup> ProServe alleges that one of the firms that was solicited is not a small business, but has proffered no evidence to that effect. Even assuming that the agency solicited a large business, such action would not convert its otherwise proper set-aside acquisition into an unrestricted acquisition. This is especially true here since the firm which ProServe alleges is a large business did not submit an offer.

<sup>4/</sup> We have, for example, found that an agency may properly conduct a small business set-aside even where the Small Business Act is technically inapplicable, so long as the acquisition is in fact conducted as a set-aside. See Gino Morena Enters., 66 Comp. Gen. 231 (1987), 87-1 CPD ¶ 121.